

**BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Proceeding on Motion of the Commission to Examine
Issues Related to the Transition to Intermodal Competition
in the Provision of Telecommunications Services

Case No. 05-C-0616

**COMMENTS
of
THE UNITED STATES DEPARTMENT OF DEFENSE AND
ALL OTHER FEDERAL EXECUTIVE AGENCIES**

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I. INTRODUCTION

The New York Public Service Commission ("Commission") initiated this proceeding to address issues concerning the appropriate regulatory framework for transition to intermodal competition by an Order issued on June 29, 2005.¹ The Commission invited comments and replies from parties with interests in telecommunications services in New York.

The United States Department of Defense and All Other Federal Executive Agencies ("DOD/FEA") are vitally interested in this case from their perspective as consumers of telecommunications services. Indeed, the federal government is one of the largest end users of telecommunications services in New York because of the presence of numerous civilian offices and military facilities in the state. There are more than 100,000 employees of federal agencies spread among 62 counties in New York State. One of the 11 regional offices of the U.S. General Services Administration is

¹ Order Initiating Proceeding and Inviting Comments, issued and effective June 29, 2005 ("*Initiating Order*").

located in New York City. Moreover, the United States Military Academy, Fort Drum, and Watervliet Arsenal, as well as dozens of operational facilities of the Department of Defense and the Department of Homeland Security, are located in the State.

To meet their numerous and diverse responsibilities, federal agencies obtain a broad spectrum of telecommunications services at both large and small service locations in urban and rural areas throughout New York. With such a significant presence, DOD/FEA is vitally interested in the rates, terms and conditions for telecommunications services, as well as the quality of these services, and the Commission's oversight of the activities of all telecommunications providers under its jurisdiction. Moreover, DOD/FEA is interested in fostering robust competition for all telecommunications services in New York.

II. GOALS FOR THE FUTURE REGULATORY FRAMEWORK

The Commission wishes to conduct a broad review of its telecommunications policies, practices and rules for regulation of services in light of the rapidly changing telecommunications environment.² In this vein, the Commission emphasizes that the principals espoused in 1996 are still the best guidelines today:

- The primary goal is ensuring the provision of quality telecommunications services at reasonable rates.
- Where feasible, competition is the most efficient way to achieve the primary goal.
- Regulation should reflect market conditions.
- Providers in like circumstances should be subject to comparable regulation.³

From its perspective as a consumer of telecommunications services, DOD/FEA concurs fully that these are the appropriate goals at this time. The availability of quality

² *Id.*, p. 4.

³ *Id.*, p. 3.

telecommunications services of all types, at reasonable rates, terms and conditions, is very important for all federal agencies.

Moreover, DOD/FEA is interested in increasing the number of service providers because competition is the most efficient way to achieve lower prices and better services for consumers. DOD/FEA has a particularly strong interest in more suppliers because federal agencies procure services through contracts obtained through competitive bidding whenever possible. Competitive bidding is most effective if there are a number of qualified bidders. Also, from an economic perspective, a greater number of bidders should result in lower costs, and better terms and conditions.

The appropriate level of regulation, matched to the extent of competition, will lead to a fair and robust telecommunications market. DOD/FEA is firmly convinced that if there is ample competition, economic forces will operate more efficiently without regulatory surveillance. As more competition develops, the level of commission intervention can and should be reduced.

Finally, during the transition period to more reliance on market forces, the Commission's surveillance should be competitively neutral to give as many firms as possible an opportunity to participate in all markets. Regulation should not favor "incumbents" over "competitors" or visa versa. The Commission should ensure that carriers without existing interconnection agreements can participate on equal terms with established carriers. In addition, the framework should be technologically neutral and not favor any available medium that end users may choose for "last mile" access to the network or any technology that carriers may wish to employ for transmission between their own nodes or to interconnect with each other. Indeed, with the recent trends in consolidation among telecommunications providers, competition in any local market may devolve to only a limited number of carriers with significant market power. If this

limited group of firms cannot vie with each other on equal footing, there will be no competition for end users at all.

III. BROAD ASSESSMENT OF COMPETITION IN NEW YORK

Before posing a number of questions concerning regulatory policies in New York, the *Initiating Order* describes the status of competition in New York.⁴ Regarding competition for wireline services, the Commission notes that competitive local exchange carriers (“LECs”) are using collocation arrangements to serve nearly 400,000 small business and residential customers.⁵ Moreover, ten carriers (including four cable companies) are actively providing “alternative services”, and competing traditional wireline carriers are serving residential customers with their own switches in 178 of Verizon’s wire centers.⁶

Regarding this assessment, DOD/FEA acknowledges that there is substantial competition, particularly in urban parts of New York State. However, DOD/FEA believes that there is not as much competition as the incumbent carriers would have the Commission find. Indeed, there may be 10 or more competitors serving some customers in the great majority of wire center areas, but it is doubtful that in most of these places the competing carriers have a strong presence, such as a four- or five- percentage point share of the market. DOD/FEA urges the Commission to consider the market size and especially the market power of the competitors relative to the incumbent.

Since many consumers have the benefits of intermodal competition, the *Initiating Order* describes a method for determining a single index for the overall extent of competition. That index employs the following weights: cable telephone (weight of 1);

⁴ *Id.*, pp. 5–9.

⁵ *Id.*, pp. 6–7.

⁶ *Id.*, p. 7.

competitive wireline LEC (weight of 1 when providing residential service or weight of 0.5 where providing only business service); wireless (weight of 0.5); and VoIP (weight of 0.75).⁷ This set of weights was employed by the Department of Public Service to assess the requirements for unbundled network elements (“UNEs”) when that matter was being evaluated by the Commission about two years ago.

In those UNE studies, an index value of 2.75 or above was employed to indicate that there was a level of competition sufficient to conclude that competitive carriers would not be impaired without access to unbundled switching.⁸ In addition, the Department of Public Service required that there be at least three alternatives to the incumbent LEC’s wireline service, as well as three different platforms to protect against market concentration.⁹

DOD/FEA believes that a procedure to measure the presence of a variety of competitive modes is appropriate today. Moreover, the weights previously assigned to the respective technologies appear to be reasonable. However, DOD/FEA believes that the tests described above do not necessarily indicate that the incumbent LEC has sufficiently little power to enable the Commission to forego price surveillance for basic services to most consumers. Assume that in a local area, three competitive wireline carriers offer service to both residential and business users and that they have, in the aggregate, one-third as many lines as the incumbent LEC. Also, assume that consumers in the area have access to two wireless carriers, and that the company with the local cable franchise is starting to offer telephone service. It appears that this mix passes the indicated test for “competitive”, but DOD/FEA does not believe that this level of competition is adequate for the Commission to forego basic service price surveillance.

⁷ *Id.*, p. 9.

⁸ *Id.*

⁹ *Id.*

DOD/FEA urges the Commission to consider the market power of the incumbent wireline LEC before eliminating price surveillance of basic services to mass market consumers. For example, if the incumbent wireline LEC is still providing the majority of service — that is, less than 50 percent of residential and small business consumers are relying on cable, VoIP and/or wireless as their only means of obtaining telecommunications service — there is not sufficient competition for the Commission to abandon surveillance of basic services.

IV. CONSUMER PROTECTIONS

In short, as long as incumbent carriers have substantial market power, the Commission needs to maintain surveillance over charges for basic telecommunications services in New York State. Although market forces have diminished the need for regulatory protections, the Commission notes that it expects some consumer protections will continue to be necessary.¹⁰ To develop the best framework, the Commission asks parties to comment broadly on regulatory policies that will further the following objectives:

1. Basic services should be evaluated and revised as necessary to meet evolving needs.
2. Basic services should be available to all residential customers who wish to use them.
3. Basic services should be accessible.
4. Basic services should be affordable and reasonably priced.
5. Funding mechanisms to support universal service must be fair, equitable, and competitively neutral.

The *Initiating Order* expresses these objectives in the context of telecommunications services to residential subscribers in New York.

¹⁰ *Id.*, p. 10.

Although the aims are enunciated for residential services, DOD/FEA believes that the Commission should maintain surveillance over basic services to both residential and business users. Specifically, DOD/FEA recommends that the Commission maintain surveillance over:

- Monthly rates and non-recurring charges for initial and additional residential lines;
- Monthly rates and non-recurring charges for initial and additional business lines; and
- Charges for local messages, if any, originated on these lines.

Line charges and local usage charges should remain under surveillance regardless of the number of lines at the location, but surveillance should not be employed for multi-line configurations such as Centrex.

The *Initiating Order* postulates a list of “basic services” for some type of surveillance by the Commission:

- Single Party Access Line;
- Access to Local/Toll Calling;
- Local Usage;
- Tone Dialing;
- Access to Emergency Services;
- Access to Assistance Services;
- Access to Telecommunications Relay Services;
- Directory Listing; and
- Privacy Protections.¹¹

In response to the question in the *Initiating Order*, DOD/FEA believes that all of the services designated above should be classified “basic” in New York State. Moreover, as noted previously in these Comments, “Single Party Access Line” should

¹¹ *Id.*, p. 11.

encompass the initial and all additional individual lines to the user at the same premises, and “user” should include both residential and business customers. Also, as a further matter of clarification, “Access to Emergency Services” should encompass any charges to end users, or to government agencies (federal or local) that are acting as the purchasing or operating entity for “911” or “E-911” services in the State. In addition, DOD/FEA recommends that toll blocking services be included in the “basic” category”. These services provide protections that are vital for some end users.

V. MARKET POWER AND REGULATORY FLEXIBILITY

The *Initiating Order* seeks comments from parties on the extent of market power enjoyed by incumbent LECs in New York State, and the resulting implications for regulatory flexibility.¹²

From DOD/FEA’s perspective, the competitors’ aggregate share of the market is a significant measure of the incumbents’ strength. The FCC’s most recent “Local Telephone Competition Report,” shows that competitive LECs have a total share of 30 percent of the New York market as of December 31, 2004.¹³ Competitive LECs have a larger share in only one state — Rhode Island.¹⁴

However, it is important to put the figures in context. Thirty percent may appear to be a great deal of competition, particularly when compared with the fact that competition was virtually zero a decade ago. However, even a 30 percent share means that incumbents are serving more than twice as many lines as all competitors in the aggregate — not twice as many as its largest competitor, but twice as many as all competitors combined. By any reasonable standard, incumbents have great market power.

¹² *Id.*, pp. 13–15.

¹³ Federal Communications Commission, Industry Analysis and Technology Division, *Local Telephone Competition as of December 31, 2004*, published July 2005, Table 6.

¹⁴ *Id.*

Moreover, it unlikely that these market shares for competitors will increase in the near future. In fact, the competitors' aggregate share may well decline. The figures in the FCC's Local Competition Report include competition through all three modes identified in the *Telecommunications Act of 1996*.¹⁵ Specifically, the competitors' share includes activities: 1) by offering services with their own facilities; 2) through resale of incumbent LECs' services; and 3) by using unbundled network elements ("UNEs"). Among these three modes, UNEs have been the most often used, and the prospects for this mode of competition are dim.

Indeed, recent court and FCC decisions result in the elimination of local switching as a UNE by early next year.¹⁶ Elimination of the local switching UNE results in terminating the availability of UNE Platform ("UNE-P") rates to competitors. UNE-Ps have been used by competitors for a large part of their service to end users.

The *Initiating Order* also discusses the importance of wireless services, noting recent improvements in the quality of service, and predicting that the FCC's recent order requiring portability of telephone numbers between wireline and wireless will encourage even more consumers to consider turning to a "wireless-only" option.¹⁷

DOD/FEA acknowledges that wireless services have become ubiquitous, and that the great majority of consumers may choose among several carriers using this technology. Moreover, there are more wireless connections than wireline connections in nearly every area. But for business users, and for most residence users as well, wireless access is a complement to wireline access, not a substitute. Although people

¹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* ("*Telecommunications Act of 1996*").

¹⁶ *See* United States Telecom Ass'n v. FCC, 359 F. 3d 554 (D.C. Cir. 2004) cert. denied, 125 S. Ct. 313,316,345 (2004). *Also*, FCC Unbundled Access to Network Elements, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, FCC 04-179, released August 20, 2004; Order on Remand, FCC 04-290, released February 4, 2005.

¹⁷ *Initiating Order*, p. 7, citing Memorandum Opinion and Order and Further Notice of Proposed Rulemaking; CTIA Petitions for Declaratory Ruling on Wireline and Wireless Porting Issues. 18FCC Rcd. 23697 (2003).

working in some occupations (such as sales, installation, and maintenance) make extensive use of wireless telephony, most businesses of any size would absolutely require one or more wireline connections at their “home base.”

Moreover, wireless competition does little to reduce the power of New York’s largest incumbent LEC because Verizon Wireless of one of the largest providers of services using this technology in New York and other states. Basically, Verizon is competing with itself in the wireless domain.

Furthermore, although there is much current interest in Voice over Internet Protocol (“VoIP”), DOD/FEA is convinced that this service is not a major threat to incumbents’ market power in New York, at least in the near future. DOD/FEA acknowledges that VoIP service offers some functionalities that are not available with traditional voice services. Also, VoIP is generally less expensive than traditional wireline, but only if the customer already subscribes to high-speed Internet access by Digital Subscriber Line (“DSL”) or cable modem service. Without substantial facilities-based competition in the wireline arena, incumbent wireline carriers and cable companies maintain an effective duopoly with respect to the “last mile” high-speed Internet access services that are essential for VoIP use.

Finally, the *Initiating Order* notes that cable telephone, with its managed network and E-911 capabilities, provides an option that is being accepted as an equivalent to traditional wireline service.¹⁸ Cable facilities pass most of the nation’s homes and businesses, and cable companies have been providing entertainment services to families for many years. Therefore, cable companies are widely recognized and well positioned as competitors to the incumbent LECs in the mass market for telecommunications services. Thus, cable companies have had notable successes in

¹⁸ *Id.*, p. 6.

marketing telecom services to the mass market in a number of the nation's metropolitan areas.

In sum, DOD/FEA believes that cable companies will be the major competitors to the incumbent LECs in many places. Thus, with little facilities-based wireline competition, the market will be led by a duopoly of one cable provider and one wireline LEC. DOD/FEA acknowledges that this is some competition. However, in a duopoly, companies tend to "follow the leader" and this framework is generally not been effective in constraining prices for services to end users.

This assessment leads to DOD/FEA's recommendation that the Commission maintain price surveillance over the basic services identified above. These services are used primarily by residential users and by business users at smaller locations, *i.e.*, by "mass market" as distinguished from "enterprise" consumers. Incumbent LECs generally have more power in the mass market than in the enterprise market, which is comprised of users at higher volume locations where competitive LECs have the financial incentive to offer services over their own facilities and have not been dependent on UNEs. As an indication of the incumbents' greater power over the mass market, the FCC's Local Competition Report referenced above states that incumbent LECs provided 66 percent of their lines to residential and small business users, while competitive LECs provided only 64 percent of their lines to these smaller users.¹⁹

In short, the Commission should continue surveillance over the prices for basic services. However, for greater parity between incumbent and competitive LECs, and to permit the incumbent carriers to respond more easily to competitors' actions, incumbent LECs should not be required to file tariffs for these services or any other services if they do not wish to do so. As an alternative to tariffs, incumbent LECs could make their

¹⁹ Federal Communications Commission, Industry Analysis and Technology Division, *Local Telephone Competition as of December 31, 2004*, published July 2005, Table 11.

prices known through price lists available on the company's web site, on the Commission's web site, and at all offices of the Commission in New York State.

For offerings other than basic services, incumbent carriers should notify affected customers of any intended rate increases by written notice 30 days in advance of a higher rate appearing on the customer's bill. The Commission should also be given 30 days notice for rate increases, and one-day's notice for rate reductions. Such notice would allow the Commission to take any action it believes necessary, while still giving competitive flexibility to the incumbent LECs.

DOD/FEA does not believe that the current level of competition justifies any additional changes in the level or nature of oversight by the Commission now. Therefore, the Commission should retain: (1) the authority to grant, modify, impose conditions on, or revoke a certificate; (2) the authority to administer the Universal Service Fund; (3) the ability to adopt rules regarding service quality; and (4) the authority to resolve complaints against a local exchange company. These aspects of regulation are appropriate to balance the needs of end users for some surveillance over incumbent carriers with substantial market power against the needs of incumbent LECs for more flexibility to compete in the marketplace.

Moreover, to facilitate competition, incumbent LECs should be allowed to enter into contracts to provide any of its telecommunications services to end users without regulation. Contracts should be effective when signed without Commission review. This flexibility is appropriate because it places incumbents in parity with their competitors.

VI. SERVICE QUALITY

As the next broad topic, the *Initiating Order* addresses issues concerning the "quality" of telecommunications services in New York.²⁰ The Commission "readily

²⁰ *Initiating Order*, pp. 15-17.

concludes that high service quality is essential to ensure New York's leadership in telecommunications and that service quality must be maintained even in a evolving telecommunications market."²¹

DOD/FEA concurs with this assessment of the importance of service quality. Above the general level of interest of residential and business subscribers in high quality services, many federal agencies have unique concerns with service quality and reliability because of the agency's role in public safety and maintenance of homeland security. Indeed, DOD/FEA was accepted by the Commission as an active party in Case No. 03-C-0922, concerning network reliability issues in New York State.²²

The basic questions posed in the *Initiating Order* are whether output-oriented measures are still valid as a means of informing consumers' choices, and, if so, should they be expanded to include all modes, such as wired and wireless, VoIP, and cable telephony?²³ From the perspective of an end user with vital interest in service quality, DOD/FEA answers the question as to whether output-oriented measures are still valid as a means of informing consumer choices with two words — "definitely yes."

Moreover, DOD/FEA believes that carriers primarily using "other" modes — that is, wireless, VoIP and cable telephony carriers — should report periodically to the Commission on certain service measures. Charges or performance levels of the carriers relying primarily on wireless, VoIP and cable telephony technologies should not be regulated, but these carriers should report in a format that allows consumers to compare their performance with that of wireline carriers.

DOD/FEA recommends that reports be disaggregated geographically to the local calling area, or reasonably comparable geographical areas in the case of VoIP or other carriers not using this geographical measure. DOD/FEA believes that in most cases

²¹ *Id.*, p. 15.

²² Case No. 03-C-0922, Active Party List as of September 4, 2003.

²³ *Initiating Order*, p. 15.

the Metropolitan Statistical Area ("MSA") is too large a reporting region for service quality measures. For example, DOD/FEA urges to Commission to require separate reporting for the five boroughs of New York City. Also, the Albany-Schenectady-Troy MSA includes Saratoga, Schenectady, Albany, Schoharie and Rensselaer counties, while Buffalo-Cheektowaga-Tonawanda MSA includes Niagara and Erie counties. These MSAs are also too large and diverse for a single service quality measure. Moreover, in addition to geographical disaggregation, DOD/FEA recommends separate reporting for (1) services to all residential users; (2) services to smaller business users, e.g. four or fewer lines at a premise; and (3) services to larger business users.

There should be little doubt that continued surveillance over the incumbents' service quality is appropriate. On October 29, 2004, an independent firm submitted "A Final Report of the Review Of Retail Service Quality Performance of Verizon New York, Inc." to the New York State Department of Public Service. The opening paragraph in the Executive Summary of that report states:

The New York wireline operations of Verizon NY experienced service quality performance problems during plan year one of the Verizon Incentive Plan Retail Service Quality Plan. These conditions continued to worsen in plan year two. As a result, Verizon NY has paid penalties (rebates) in the amount of \$55 million dollars to the Verizon NY customers that were affected by these service quality problems. In addition, these issues also prompted an investigation by the New York Department of Public Service into the actions being taken by Verizon NY to address these service quality issues.²⁴

DOD/FEA believes that this assessment, less than a year old, provides ample basis for continuation of service quality reporting for major wireline carriers and requirements for limited reporting by carriers employing other technologies.

As an important source of information, DOD/FEA urges the Commission to continue the requirements in the current Quarterly Service Quality Reports for wireline

²⁴ "A Final Report of the Review of Retail Service Quality Performance of Verizon New York, Inc." Doherty & Company, Inc., October 29, 2004, p. H-1 (abbreviations omitted).

carriers. DOD/FEA understands that service quality reporting requirements on incumbent carriers have been relaxed in recent years.²⁵ The most recent report, filed May 18, 2005, seems to provide a reasonable level of detail for major incumbent carriers. This report is not disaggregated geographically or by customer type, but the information is clearly presented and available to all consumers on the Commission's web site.

Some of the service quality measures in the present report are fairly peripheral to the essential operation of the network:

- time to meet service initiation requests;
- time to answer calls to toll and assistance operators;
- time to answer calls to business offices; and
- time to answer directory assistance calls.

These metrics should be self-policing in a reasonably competitive environment; a carrier with inferior performance will experience the loss in terms of reduced growth and greater customer churn. Moreover, these metrics generally do not have an impact on the availability or reliability of the telecommunications network when critically needed. Thus, although DOD/FEA believes that these measures should be continued in the existing reporting format for large wireline carriers, at least for the time being, requirements for reporting in this detail should not be extended to other carriers.

For all carriers meeting a certain size threshold, whether using VoIP, wireless or cable as their primary delivery mode, DOD/FEA recommends reporting of a group of measures most critical to the reliability and availability of service on a quarterly basis. These include:

- the percentage of access lines with some reported outage in a month;

²⁵ *Initiating Order*, p.17.

- the average time to restore service on an access line after an outage has been reported;
- frequency of service problems affecting public access to 911, operator services, Telephone Relay Services, services by designated emergency responders, public transportation terminals, or national defense installations; and
- all instances of service problems that affect large numbers of local subscribers for more than a transient period.

Performance in meeting these measures should be reported on a disaggregated basis by all incumbent and competitive wireline carriers, as well as by carriers relying on other technologies to the extent that the measures are applicable to the operations and services of the carrier.

VII. LEVEL PLAYING FIELD

The Initiating Order enunciates a number of principles that the Commission established in 1996 to support a “level playing field” for competitors generally. These are:

1. Customers must be able to call all valid telephone numbers.
2. Telephone numbers are a common resource to be shared among carriers.
3. Control of telephone numbers must shift from the incumbent carriers.
4. Customers and competitors must have access to the telephone numbers and directory listings of all other carriers.
5. Interconnection into networks of telephone corporations shall be provided for other public or private networks.
6. Separate services and functions requested by users shall be provided to the extent technically and economically feasible.
7. A carrier’s bottleneck facilities should serve the public interest.
8. Traffic and related data (e.g., billing and routing information) must be exchanged between local exchange carriers.

9. Local exchange carriers are entitled to compensation for the costs of the services provided to each other.
10. Compensation charges and rates should be cost-based, uniform, and encourage long-term efficiency.
11. Policies, prices and practices should be competitively neutral, and promote competitive entry.²⁶

In the *Initiating Order*, the Commission invites comments on the pertinence of these principles in an intermodal environment.

In response, DOD/FEA would like to emphasize that from its consumer perspective, all of these principles remain effective today. For example, with reference to Principal 11, competitive neutrality is especially important to maintain choices for consumers with consolidation in many segments of the industry, as noted previously in these Comments.

Additionally, in recent Reply Comments to the Federal Communications Commission ("FCC") concerning that agency's activities to reform the framework of intercarrier compensation for all carriers, the Federal Executive Agencies explained the importance of a compensation plan which is "economically efficient, competitively neutral, technologically neutral, and balanced to promote retail rate stability."²⁷ These Reply Comments stressed that with an economically efficient plan, intercarrier compensation charges must be set to reflect the level of costs as nearly as possible, and that such cost-based charges will reduce the opportunities for arbitrage that can give advantage to one competitor over another.²⁸

These principals have served carriers and consumers well. DOD/FEA is pleased that the Commission has acknowledged their importance, and urges the Commission to

²⁶ *Id.*, p. 18.

²⁷ FCC Docket No 01-92, Reply Comments of the U.S. General Services Administration, p. i and pp. 3-5.

²⁸ *Id.*, p. 4.

recognize their continuing value in progress towards a more competitive marketplace in New York.

VIII. CONCLUSION

WHEREFORE, the premises considered, the U.S. Department of Defense and All Other Federal Executive Agencies urge the Commission to adopt the recommendations in these Comments.

Respectfully submitted,



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for
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and
All Other Federal Executive Agencies

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